(8)

No. 90-1156

FILED
APR 11 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

RESPONDENTS' SECOND SUPPLEMENTAL FILING

WILLIAM AARON
City Attorney
BRUCE E. NACCARI
Deputy City Attorney
MICHAEL W. TIFFT
Deputy City Attorney
1300 Perdido Street
New Orleans, Louisiana 70112
(504) 565-6355

KENNETH M. CARTER
SIDNEY H. CATES, IV
CARTER & CATES
Suite 1230 Energy Center
1100 Poydras Street
New Orleans, Louisiana 70163
(504) 569-2005

CLINTON A. VINCE*
BERNHARDT K. WRUBLE
JOHN S. MOOT
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND,
CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

WALTER J. WILKERSON
WILKERSON, HENRY & PEREZ
Suite 1800, Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
(504) 522-4572

*Counsel of Record

April 15, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1156

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

RESPONDENTS' SECOND SUPPLEMENTAL FILING

On April 6, 1991, petitioner made a supplementary filing pursuant to Rule 15.7 to bring attention to the April 4, 1991 decision of the Louisiana Court of Appeals for the Fourth Circuit, which upheld the Council's rate order, except as the order sought to moderate the remedy imposed upon NOPSI, based on consideration of its economic impact. *Alliance for Affordable Energy, Inc. v. Council of the City of New Orleans*, 90-CA-0420. Petitioner's filing emphasized that the decision would result in its bearing a substantial additional disallowance for imprudence.

On April 9, 1991, respondents made a supplementary filing more fully describing the aforesaid intermediate state appellate court decision and its posture under Louisiana procedural rules.

The instant supplement is filed to call attention to the intervening April 5, 1991 decision of the Louisiana Supreme Court in *Gulf States Utilities Company v. Louisiana Public Service Commission*, 88-CA-0709, 90-CA-0445, which upholds the type of moderation approach toward a prudence disallowance followed here by the Council. It specifically holds that in a prudence proceeding a regulator may take steps "tempering the disallowance in order to maintain the utility's solvency" (Slip Op. at 46), and "could reasonably have concluded that consumer interests were better served by maintaining [the utility] in a position to provide a reliable supply of electric service than by resorting to the uncertainties of the bankruptcy court." *Id.* (an extract from the opinion is attached as an appendix hereto).

The Fourth Circuit decision referred to above will have to be conformed to this statement of Louisiana law when this and other issues are finally determined in the course of the state's rehearing and appellate processes. These events further underscore the appropriateness of the Court's declining to become involved in the matter at this stage.

Respectfully submitted,

WILLIAM AARON
City Attorney
BRUCE E. NACCARI
Deputy City Attorney
MICHAEL W. TIFFT
Deputy City Attorney
1300 Perdido Street
New Orleans, Louisiana 70112
(504) 565-6355

KENNETH M. CARTER
SIDNEY H. CATES, IV
CARTER & CATES
Suite 1230 Energy Center
1100 Poydras Street
New Orleans, Louisiana 70163
(504) 569-2005

CLINTON A. VINCE *
BERNHARDT K. WRUBLE
JOHN S. MOOT
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND,
CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

WALTER J. WILKERSON
WILKERSON, HENRY & PEREZ
Suite 1800, Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
(504) 522-4572

* Counsel of Record

April 15, 1991

SUPREME COURT OF LOUISIANA

Nos. 88 CA 0709
90 CA 0445

GULF STATES UTILITIES COMPANY

Versus

LOUISIANA PUBLIC SERVICE COMMISSION

CALOGERO, Chief Justice

• • •

[EXTRACT]

Regarding the arguments of the Attorney General, it is true that public utility regulation does not insure that the business shall produce net revenues. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). The Supreme Court decisions in *Hope* and the subsequent case of *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), have been construed to mean that there is no requirement that the end result of a rate-making body's adjudication must be the setting of rates at a level that will guarantee the continued financial integrity of the utility. See, *e.g.*, *Kansas Gas & Elec. Co. v. State Corp. Comm'n*, 720 P.2d 1063 (Kan. 1986); *Appeal of McCool*, 514 A.2d 501 (N.H. 1986); *Pennsylvania Elec. v. Pennsylvania Pub. Util.*, 502 A.2d 130 (Pa. 1985). However, it is also true that it is the Public Service Commission which is constitutionally accorded the authority to decide how the interests of ratepayers and the utility should be balanced in any given rate case. In the exercise of that authority, the Commission may, within its discretion, make a policy determination concerning whether the interests of

the ratepayers are better served by disallowing the full damages flowing from a utility's imprudence, or by tempering the disallowance in order to maintain the utility's solvency. See *Appeal of McCool*, 514 A.2d 501 (N.H. 1986).

The Attorney General does not dispute the Commission's authority to make such a policy determination. Rather, he argues that because there was no inquiry concerning the total damages resulting from Gulf States' imprudence or the effects of its insolvency, the Commission had no factual basis on which to make such a determination in this case. The record reveals, however, that employees of Kennedy & Associates did testify regarding their estimates, albeit rough ones, of the total disallowance which would result if the Cajun buybacks and accounting deferrals (the two factors which the Commission chose to disregard in calculating the imprudence disallowance) were considered. In addition, Mr. Komanoff analyzed what the expected cost of an alternative coal plant would have been, and testified extensively on the full imprudence disallowance which he would recommend concerning Gulf States' investment in River Bend. As a result of this testimony, the Commission found that the full extent of the damages resulting from the company's imprudent decision was $2 billion. Further, there was testimony before the Commission, presented by witnesses on behalf of the Attorney General, concerning the possible beneficial effects of bankruptcy reorganization of utilities in general, and of Gulf States in particular. Given the evidence in the record, we find that the Commission could reasonably have concluded that consumer interests were better served by maintaining Gulf States in a position to provide a reliable supply of electric service than by resorting to the uncertainties of the bankruptcy court.

[Slip op. at 45-46.]

• • •

AFFIRMED IN PART; REVERSED IN PART